

EPA-PNL-1619

Phil North/R10/USEPA/US

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To Peter Micciche

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Subject Clean Water Act 404(c) Proces

Hi Peter,

It was good to have the opportunity to talk with you this morning and I appreciate your staying to chat about Bristol Bay. Many of us who have been involved in the regulatory process for a long time are concerned with the state of permitting in Alaska today (state and federal). I really like your idea for getting people together to talk about what reasonable development in Alaska might look like, that takes into account our opportunity to avoid the ecological losses suffered in the past 400 years of development in North America. I think it will be an important discussion. We have healthy lands in Alaska, we should figure out how to keep them.

Here is the 404c factsheet. It is unfortunate that this is referred to as a "veto" authority. In fact we can also restrict discharge, not just prohibit it. That is where the discussion has ranged in terms of Bristol Bay, to create the terms under which discharge could happen. However we could prohibit discharge also. In fact the State of Alaska currently has a prohibition on discharge of materials in and within 100 feet of certain reaches of anadromous streams in the Bristol Bay Area (Mineral Closing Order 393). The closure includes part of the Pebble claim block on Upper Talarik Creek. It will be interesting to see if that closing order is conveniently withdrawn when/if it comes to permit review time.

Good luck on Tuesday.

Phil



404c Factsheet.pdf

Phillip North  
Environmental Protection Agency  
Kenai River Center  
514 Funny River Road  
Soldotna, Alaska 99669  
(907) 714-2483  
fax 260-5992  
north.phil@epa.gov

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United States  
Environmental  
Protection Agency

# Clean Water Act

## Section 404(c) “Veto Authority”

The Clean Water Act authorizes the U.S. Army Corps of Engineers (the Corps) (Section 404(a)) or an approved state (Section 404(h)) to issue permits for discharges of dredged or fill material at specified sites in waters of the United States. Section 404(c), however, authorizes EPA to restrict, prohibit, deny, or withdraw the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

### “Veto Authority”

Under Section 404(c), EPA may exercise a veto over the specification by the Corps or by a state of a site for the discharge of dredged or fill material. EPA may also prohibit or otherwise restrict the specification of a site under Section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state. In effect, Section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued.

Because Section 404(c) actions have mostly been taken in response to unresolved Corps permit applications, this type of action is frequently referred to as an EPA veto of a Corps permit. Although the Corps processes approximately 60,000 permit actions per year,<sup>1</sup> EPA has used its Section 404(c) authority very sparingly, issuing only 13 final veto actions since 1972.

An EPA Regional Administrator initiates a 404(c) action if he or she determines that the impact of a proposed permit activity is likely to result in:

- significant degradation of municipal water supplies (including surface or ground water) or,
- significant loss of or damage to fisheries, shellfishing, wildlife habitat, or recreation areas.

<sup>1</sup> Source: Corps permit data 1988-2010, U.S. Army Corps of Engineers Headquarters, Regulatory Branch.

### Section 404(c) “Veto” Process

#### Intent to Issue Notice of Proposed Determination

The EPA Regional Administrator notifies the Corps and the project proponent of his or her intention to issue a public notice of a Proposed Determination to withdraw, prohibit, deny, or restrict the specification of a defined area for discharge of dredged or fill material.

#### Notice of Proposed Determination

If the Regional Administrator is not satisfied that no unacceptable adverse effects will occur, a notice of the Proposed Determination is published in the *Federal Register*. The Proposed Determination begins the process of exploring whether unacceptable adverse effects will occur.

#### Public Comment Period (generally between 30 and 60 days)

A public hearing is usually held during the comment period.

#### Recommended Determination or Withdrawal (within 30 days of the public hearing or, if no public hearing is held, within 15 days of the end of the comment period)

The Regional Administrator prepares a Recommended Determination to withdraw, prohibit, deny, or restrict the specification of a defined area for disposing of dredged or fill material and forwards it along with the administrative record to the EPA Assistant Administrator for Water. Alternatively, he or she withdraws the Proposed Determination.

#### Corrective Action

(within 30 days of receipt of the Recommended Determination)

The EPA Assistant Administrator contacts the Corps and project proponent and provides them 15 days to take corrective action to prevent unacceptable adverse effects.

#### Final Determination

(within 60 days of receipt of the Recommended Determination)

The EPA Assistant Administrator affirms, modifies, or rescinds the Recommended Determination and publishes notice of the Final Determination in the *Federal Register*.



# Final Section 404(c) Veto Determinations

The thirteen 404(c) actions that EPA has finalized as of 2011 have involved unacceptable adverse impacts to a variety of aquatic resources including freshwater forested, emergent and shrub wetlands; tidal freshwater and tidal estuarine wetlands; as well as streams, rivers, and lakes. As noted in the following table, these final 404(c) actions have involved a variety of projects across a broad geographic area.

	Project Name	Initiation and Final Determination Dates	Location		
			EPA Region	State	Corps District
13	<b>Spruce No. 1 Surface Mine</b> Surface Coal Mine	<ul style="list-style-type: none"> <li>Initiated October 16, 2009</li> <li>Final Determination issued January 13, 2011</li> </ul>	3	WV	Huntington
12	<b>Yazoo Pumps</b> Flood Control Project	<ul style="list-style-type: none"> <li>Initiated February 1, 2008</li> <li>Final Determination issued August 31, 2008</li> </ul>	4	MS	Vicksburg
11	<b>Two Forks</b> Water Supply Impoundment	<ul style="list-style-type: none"> <li>Initiated March 24, 1989</li> <li>Final Determination issued November 23, 1990</li> </ul>	8	CO	Omaha
10	<b>Big River</b> Water Supply Impoundment	<ul style="list-style-type: none"> <li>Initiated August 24, 1988</li> <li>Final Determination issued March 1, 1990</li> </ul>	1	RI	New England
9	<b>Ware Creek</b> Water Supply Impoundment	<ul style="list-style-type: none"> <li>Initiated August 4, 1988</li> <li>Final Determination issued July 10, 1989</li> </ul>	3	VA	Norfolk
8	<b>Lake Alma</b> Dam and Recreational Impoundment	<ul style="list-style-type: none"> <li>Initiated June 8, 1988</li> <li>Final Determination issued December 16, 1988</li> </ul>	4	GA	Savannah
7	<b>Henry Rem Estates</b> Agricultural Conversion - Rockplowing	<ul style="list-style-type: none"> <li>Initiated April 22, 1987</li> <li>Final Determination issued June 15, 1988</li> </ul>	4	FL	Jacksonville
6	<b>Russo Development Corps</b> Warehouse Development (After-the-fact permit)	<ul style="list-style-type: none"> <li>Initiated May 26, 1987</li> <li>Final Determination issued March 21, 1988</li> </ul>	2	NJ	New York
5	<b>Attleboro Mall</b> Shopping Mall	<ul style="list-style-type: none"> <li>Initiated July 23, 1985</li> <li>Final Determination issued May 13, 1986</li> </ul>	1	MA	New England
4	<b>Bayou Aux Carpes</b> Flood Control Project	<ul style="list-style-type: none"> <li>Initiated December 17, 1984</li> <li>Final Determination issued October 16, 1985</li> </ul>	6	LA	New Orleans
3	<b>Jack Maybank Site</b> Duck Hunting/Aquaculture Impoundment	<ul style="list-style-type: none"> <li>Initiated April 15, 1984</li> <li>Final Determination issued April 5, 1985</li> </ul>	4	SC	Charleston
2	<b>Norden Co.</b> Waste Storage/Recycling Plant	<ul style="list-style-type: none"> <li>Initiated September 30, 1983</li> <li>Final Determination issued June 15, 1984</li> </ul>	4	AL	Mobile
1	<b>North Miami</b> Landfill/Municipal Recreational Facility	<ul style="list-style-type: none"> <li>Initiated June 25, 1980</li> <li>Final Determination issued January 19, 1981</li> </ul>	4	FL	Jacksonville

## Selected References

EPA Clean Water Act Section 404(c) website: [http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c\\_index.cfm](http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c_index.cfm)  
EPA Clean Water Act Section 404(c) Fact Sheet: <http://water.epa.gov/type/wetlands/outreach/upload/404c.pdf>  
Chronology of Final Section 404(c) Actions: <http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm>  
EPA Wetlands Division website: <http://water.epa.gov/type/wetlands/index.cfm>